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Nos. 87-976, 87-977, 87-979

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

CITY OF WILLCOX, ARIZONA, and
ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF RESPONDENT MARYLAND PEOPLE'S COUNSEL

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March 16, 1988

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QUESTION PRESENTED

May the Federal Energy Regulatory Commission condition natural gas transportation services in order to prevent undue discrimination and the abuse of monopoly power by interstate natural gas pipeline companies.

PARTIES TO THE PROCEEDING

The Maryland People's Counsel adopts by reference the list of the parties to the proceedings below as set forth at pages (ii) through (v) of the Petition For Writ Of Certiorari filed in Case No. 87-977 by Petitioner Texas Eastern Transmission Corporation.

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BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Respondent, the Maryland People's Counsel ("MPC"), files this brief in opposition to the following petitions for writ of certiorari: Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission, No. 87-976; Texas Eastern Transmission Corporation v. Federal Energy Regulatory Commission, No. 87-977; and, City of Wilcox, Arizona and Arizona Electric Power Cooperative v. Federal Energy Regulatory Commission, No. 87-979. Each petition seeks review and reversal of the same portion of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Associated Gas Distributors v. Federal Energy Regulatory Commission,* 824 F.2d 981 (D.C. Cir. 1987).

MPC is an agency of the State of Maryland legislatively mandated to represent the interests of Maryland's residential and noncommercial users of natural gas and other regulated utility services before federal and state agencies and the courts. Md. Ann. Code, art. 78, §15 (1980). MPC was a petitioner in the proceedings below. MPC does not agree with petitioners' assertion that the opinion below unlawfully imposes common carrier status on interstate natural gas pipeline companies. The decision below correctly holds that the Federal Energy Regulatory Commission may condition natural gas transportation services by interstate pipelines in order to remedy unduly discriminatory and anticompetitive behavior on the part of the pipelines.

OPINIONS AND ORDERS BELOW

MPC adopts the listing of opinions and orders below as set forth on page 2 of the Petition For Writ Of Certiorari in Case No. 87-976 by Petitioner Interstate Natural Gas Association of America.

JURISDICTION

The judgment of the court below was entered on June 23, 1987. Orders denying petitions for rehearing and suggestions for rehearing *en banc* were entered on September 15, 1987.

The petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

MPC adopts the listing of statutes set forth on page 3 of the Petition For Writ Of Certiorari in Case No. 87-976 by Petitioner Interstate Natural Gas Association of America.

STATEMENT OF THE CASE

In October of 1985, the Federal Energy Regulatory Commission ("the Commission") promulgated Order No. 436.[1] Based on an extensive record, the Commission concluded, *inter alia,* that: (1) certain programs authorizing interstate pipeline companies to provide gas transportation services were unduly discriminatory; and, (2) these programs allowed the pipelines to abuse their monopoly power to the detriment

[1] The Commission's Order No. 436, reviewed by the court below, is set forth at 50 Fed. Reg. 42,408 (October 18, 1985). Related orders are: (1) Order No. 436-A, 50 Fed. Reg. 52,217 (December 23, 1985); (2) Order No. 436-B, 51 Fed. Reg. 6398 (February 24, 1986); (3) Order No. 436-C, 51 Fed. Reg. 11,566 (April 4, 1986); (4) Order No. 436-D, 51 Fed. Reg. 11,569 (April 4, 1986); and, (5) Order No. 436-E, 51 Fed. Reg. 11,566 (April 4, 1986).

of consumers. In order to remedy the past abuses and to prevent the recurrence of these abuses, the Commission exercised its statutory authority to regulate pipelines by attaching certain conditions to certificates authorizing the provision of natural gas transportation services. Thus, Order No. 436 requires that transportation of natural gas pursuant to either a "blanket" certificate of public convenience and necessity issued pursuant to Section 7 of the Natural Gas Act, 15 U.S.C. §717f,[2] or Section 311 of the Natural Gas Policy Act, 15 U.S.C. §3371,[3] must be performed on a nondiscriminatory basis. Simply stated, this "open access" condition provides that an interstate pipeline may not discriminate among its customers in providing gas transportation services.

Historically, pipelines purchased gas from producers, then resold it to local distribution companies ("LDCs") for further resale to ultimate end-users, including residential, commercial and industrial consumers. This traditional "merchant" function combined the sale of the gas with the transportation service necessary to move the gas from the producer to the pipelines' customers. Pipelines did not generally offer their customers transportation services for gas purchased from third parties.

In 1983, the Commission issued so-called "blanket" certificates to interstate pipelines authorizing the transportation of gas to fuel-switchable customers.[4] "Blanket" authorization eliminated the requirement that pipelines obtain individual approval for each proposed transaction, a time-consuming

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[2] The Natural Gas Act of 1938 ("NGA"), 15 U.S.C. §§717-717z (1982).

[3] The Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§3301-3432 (1982).

[4] *See Columbia Gas Transmission Corporation*, "Findings And Order After Statutory Hearing Granting Interventions And Issuing Certificate Of Public Convenience And Necessity," 25 F.E.R.C. (CCH) ¶61,220 (1983); *Interstate Pipeline Blanket Certificates For Routine Transactions*, "Final Rule, Order No. 234-B," 24 F.E.R.C. (CCH) ¶61,099, FERC Statutes and Regulations, (CCH) ¶30,476 (1983); and, *Sales And Transportation By Interstate Pipelines And Distributors*, "Final Rule, Order No. 319," 24 F.E.R.C. (CCH) ¶61,100, FERC Statutes And Regulations, (CCH) ¶30,477 (1983).

and often costly process. The "blanket" certificates authorized transportation programs which allowed customers with the ability to utilize an alternate fuel (usually oil) to negotiate directly with producers for gas at a price well below that of the pipelines' gas supplies, and to have these "third party" gas purchases transported by the pipeline. However, LDCs, which serve primarily residential and commercial customers, were barred from participating in these programs. Because they were unable to utilize either alternate fuels or pipeline transportation services, these customers, sometimes referred to as "captive" customers, were forced to meet their needs through purchases of the pipelines' high-priced gas.

MPC challenged these programs, arguing that they unlawfully discriminated against captive customers. MPC argued that the programs fostered the abuse of the pipelines' monopoly power by allowing the pipelines to segment their markets, selling gas at above-market prices to captive customers while collecting transportation revenues from fuel-switchable customers. In a series of cases commonly known as the *Maryland People's Counsel* cases,[5] the United States Court of Appeals for the District of Columbia Circuit found these programs to be both "unduly discriminatory" and "anticompetitive." The Court held that transportation programs giving customers access to market-priced gas could not be limited to fuel-switchable customers, but must be offered to LDCs and other captive customers on nondiscriminatory terms. *MPC I*, 761 F.2d at 774-79; *MPC II*, 761 F.2d at 789.

In response to the *MPC* cases, as well as other significant changes in the natural gas industry, the Commission promulgated Order No. 436. That Order required that a pipeline requesting "blanket" authorization to transport third party, market-priced gas may do so only on a nondiscriminatory

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[5] *Maryland People's Counsel v. FERC*, 761 F.2d 768 (D.C. Cir. 1985) ("MPC I"); *Maryland People's Counsel v. FERC*, 761 F.2d 780 (D.C. Cir. 1985) ("MPC II"); *Maryland People's Counsel v. FERC*, 768 F.2d 450 (D.C. Cir. 1985) *("MPC III");* collectively referred to as the *"Maryland People's Counsel"* or *"MPC"* cases.

basis. Numerous parties challenged various aspects of Order No. 436, and on June 23, 1987, the United States Court of Appeals for the District of Columbia Circuit rendered its decision in *Associated Gas Distributors v. Federal Energy Regulatory Commission,* 824 F.2d 981. This decision upheld the Commission's authority to condition gas transportation services so as to prevent discriminatory and anticompetitive behavior, but vacated Order No. 436 on other grounds. On August 7, 1987, the Commission rendered interim Order No. 500, which reimplemented the open access condition, and responded to other concerns of the court below.[6]

SUMMARY OF ARGUMENT

The petitioners seek reversal of those portions of the decision below which uphold open access conditioning of pipeline transportation services, arguing that this portion of Order No. 436 drastically changed the natural gas industry and unlawfully changed the traditional merchant function of interstate pipelines. With respect to the former, it is true that dramatic changes are taking place within the natural gas industry. Order No. 436 may be viewed as both a result and a cause of these changes. However, to the extent these changes are the result of lawful actions by the Commission, they provide no basis for a grant of certiorari.

With respect to the latter, the petitioners allege that the decision below affirmed an unlawful exercise of the Commis-

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[6] *Regulation Of Natural Gas Pipelines After Partial Wellhead Decontrol,* "Interim Rule And Statement Of Policy, Order No. 500," 52 Fed. Reg. 30,334 (August 14, 1987).

sion's authority. They argue that the imposition of an open access condition on the certificates which authorize pipelines to provide gas transportation services is tantamount to the imposition of common carrier status. In addition, the petitioners argue that pipelines have no choice but to abandon their traditional merchant function and become open access transporters. These arguments do not provide a sound basis for issuance of the writ. Quite simply, neither the Commission's Order nor the decision below compels a pipeline to provide transportation services. Indeed, pipelines may continue to operate in the more traditional merchant mode, ignoring Order No. 436 entirely. All that Order No. 436 provides is that *if* a pipeline voluntarily chooses to request blanket authorization to perform transportation services, it must provide such services on a nondiscriminatory basis.

The decision below, consistent with well-established principles of law, holds that the Commission may condition pipelines' requests to provide gas transportation service so as to prevent undue discrimination, to remedy past anticompetitive behavior by the pipelines, and to promote competition within the gas industry. These findings are not only consistent with the express language of the NGA and NGPA, but with the Congressional intent which underlies the enactment of those statutes.

The imposition of a condition on transportation authorization granted in response to a voluntary request is not tantamount to imposing common carrier status on pipelines. Even if the Commission may not compel pipelines to provide transportation services (a point which MPC does not concede), the Commission may withhold requested authorization to transport gas unless the pipeline agrees to provide such service in a manner which is neither unduly discriminatory nor anticompetitive. It is well settled that pipelines do not have an unfettered right to provide transportation and other services on only such terms and conditions as they may themselves dictate. Rather, the Commission may issue remedial orders and attach conditions to certificates which further the purposes of the NGA and NGPA.

REASONS FOR DENYING THE WRIT

A. The Commission May Condition Certificates Authorizing Transportation Services So As To Prevent Discriminatory And Anticompetitive Practices

The petitioners challenge the Commission's authority to condition transportation certificates on open access, arguing that this condition compels pipelines to serve as common carriers. The merits of petitioners' common carrier arguments are discussed *infra*. However, it is appropriate to first address the Commission's authority to act so as to prevent discriminatory and anticompetitive behavior on the part of interstate pipelines.

It is true, as petitioners state, that agencies possess only those powers expressly bestowed on them. *See, e.g., Lyng v. Payne,* 476 U.S. 926, 937 (1986); *Civil Aeronautics Board v. Delta Air Lines, Inc.,* 367 U.S. 316, 322 (1961). However, contrary to the petitioners' assertions, the Commission has express authority, of both a broad and a specific nature, to prevent and remedy anticompetitive and unduly discriminatory behavior.

The Commission is granted broad authority by both the NGA and the NGPA to protect consumers from pipeline abuses. The Supreme Court has recognized that the NGA "was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Co. v. Public Service Commission,* 360 U.S. 378, 388 (1959). Moreover, as revealed by the legislative history, a fundamental purpose of the NGA is to protect interstate gas consumers from the pipelines' monopoly power. *See,* S. Doc. No. 92, part 84A, 70th Cong., 1st Sess. 588-91 (FTC Utility Corporation Rep. 1935). Similarly, the Supreme Court has observed that the NGPA preserved the Commission's NGA authority to control pipeline practices so as to prevent the abuse of monopoly power. *Public Service Commission v. Mid-Louisiana Gas Co.,* 463 U.S. 319, 327-31 (1983).

To further its broad mandate to protect consumers, the Commission was given specific authority to condition pipeline services which it authorized pursuant to the NGA and NGPA. Section 7(c) of the NGA imposes an affirmative duty on pipelines to obtain certificate authorization from the Commission prior to performing a service such as natural gas transportation. The Commission, however, is not *required* to authorize such services under the terms requested by the pipeline; it may deny or condition the authority requested so as to prevent even temporary harm to the consuming public. *See. e.g., MPC I,* 761 F.2d at 778; *Atlantic Refining Co. v. Public Service Commission,* 360 U.S. at 392. The NGPA gives the Commission similar authority to impose "such terms and conditions as the Commission may prescribe" on transportation performed pursuant to Section 311, 15 U.S.C. §3371.

The power to regulate discriminatory and anticompetitive practices is not derived by implication, but is expressly set forth in both the NGA and the NGPA. As observed by the court below, the NGA expressly addresses such behavior:

> The Act fairly bristles with concern for undue discrimination. Section 4 prohibits any "undue preference" and any "unreasonable difference in rates, charges, service, facilities, or in any other respect," and empowers the Commission to review tariffs filed by pipelines in order to reject ones violating the prohibition. 15 U.S.C. §717c (1982). Section 5—the primary authority invoked by the Commission here—directs the Commission to adopt corrective measures whenever it finds a "rate, charge or classification," or any "rule, regulation, practice, or contract" affecting the same, to be "unjust, unreasonable, unduly discriminatory, or preferential." *Id.* §717d.

(J.A. 26a).[7] The authority to impose a condition which prohibits undue discrimination and fosters competition is well within the Commission's NGA powers. Moreover, where, as here, the Commission utilizes its NGA Section 5 powers to remedy past discriminatory and anticompetitive behavior, the agency's discretion is, "if anything, at zenith." *Niagara Mohawk Power Corp. v. FPC,* 379 F.2d 153, 159 (D.C. Cir. 1967).

The power to regulate such behavior is also expressly authorized by Section 311 of the NGPA, 15 U.S.C. §3371. Section 311(c) provides that any transportation service conducted pursuant to Section 311(a) may be conditioned on such terms and conditions as the Commission authorizes. As discussed *supra*, the NGPA preserved the Commission's authority to prevent the abuse of monopoly power by pipelines. *See Public Service Commission v. Mid-Louisiana Gas Co.,* 463 U.S. at 327-331. Section 311 provides the means for the exercise of this authority.

In the past, the Commission had refused to exercise its powers to require nondiscriminatory access to transportation services offered by pipelines. Instead, the Commission granted pipelines the authority to provide gas transportation service to customers of their choice, i.e., fuel-switchable customers.[8] The results were predictable: when the price of the gas sold by the pipelines rose to levels in excess of the cost of alternate fuels, the pipelines offered to provide gas transportation services to those customers with alternate fuel capability. This enabled the pipelines to avoid the loss of transmission revenues they would suffer if these customers switched to other fuels and abandoned the pipelines entirely. At the same time, the pipelines refused to offer transportation services to LDCs and other captive customers, assuring themselves a market for their over-priced gas. *MPC I,* 761 F.2d at 771-73; *MPC II,* 761 F.2d at 783-85.

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[7] Joint Appendix citations are to the "Joint Appendix To Petitions For Writ of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit" filed by the petitioners.

[8] See footnote 4 and accompanying text *supra.*

The decisions in *MPC I* and *MPC II* held such programs to be anticompetitive and, therefore, unduly discriminatory under the NGA. In *MPC II*, the court directed the Commission to "fully consider and reasonably analyze the competitive concerns raised," vacating the programs "to the extent that they allow transportation of direct-sale gas to fuel-switchable, non-'high-priority' endusers without requiring pipelines to furnish the same service to LDCs and captive consumers on non-discriminatory terms." 761 F.2d at 789 (footnote omitted). The court further held that in approving these programs, the Commission failed to attend to its "prime constituency—the consumers whom the Natural Gas Act . . . was designed 'to protect . . . against exploitation at the hands of natural gas companies.' " *Id.* at 781 (citations omitted).

Following the *MPC* cases, the Commission undertook an extensive review of its transportation policies. In Order No.436, the Commission made specific findings, based on an extensive evidentiary record, that pipelines had exercised monopoly control over their facilities to either protect or gain an advantage in the marketing of their own gas. It was further found that the existing regulatory structure had failed to assure that the benefits of competition would reach all segments of the consuming market. Thus, existing transportation programs were found to be unjust, unreasonable, and unduly discriminatory pursuant to Section 5 of the NGA. The Commission concluded that permitting transportation services to be offered on a basis which would have the effect of granting any pipeline an exclusive franchise to provide self-implementing or blanket certificate transportation to any particular class of customers (to the exclusion of others) would violate the NGA and NGPA. 62 Fed. Reg. at 42, 426–27.

The court below correctly held that the Commission may lawfully condition pipeline transportation services to prevent their use as a tool to exploit consumers. *See, MPC II,* 761 F.2d at 781. The Commission has the authority to permit pipelines to transport gas conditioned as necessary to fulfill the Commission's NGA and NGPA obligations. Indeed, as found in the

MPC cases, a failure to so condition transportation services clearly violates this mandate. Thus, because the Commission has done no more than exercise its lawful powers, there is no need for this Court to exercise its discretion to review the decision below.

B. Neither Order No. 436 Nor The Decision Below Imposes Common Carrier Status On Pipelines

1. Order No. 436 Does Not Compel Pipelines To Provide Transportation Services

Citing this Court's decision in *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979), petitioners argue that the imposition of an open access condition is equivalent to an obligation to provide service without discretion; an obligation the petitioners describe as the essence of common carriage. This argument fails at the outset because it does not recognize that a second condition must also be met for common carrier status to exist: the party on whom the obligation is imposed must be *compelled* to provide service. In *Midwest Video*, cable television system operators were divested of *all* discretion to determine who could use certain channels. Programming choices were shifted to the user, and the operator was completely stripped of the ability to decide how to use its cable system. *Id.* at 700.

In sharp contrast, neither Order No. 436 nor the decision below divests pipelines of control over their own systems. Pipelines are *not* compelled to provide transportation services. Order No. 436 fully protects the pipelines' merchant function: pipelines may choose to operate in traditional fashion, purchasing gas from producers and reselling it to local distribution companies and other end users for a "package" price which includes the commodity price for the gas and a charge for the transportation service. As an alternative, Order No. 436 allows, but does not require, pipelines to provide a separate "unbundled" transportation service, distinct from, and in addition to, any sales service offered by the pipeline. (J.A. 17a).

Obviously, the exercise of this alternative places the pipelines' sales gas in competition with gas sold by third parties. However, it also allows a pipeline to maximize throughput—and therefore, profit—by both transporting and selling gas. It cannot be overly stressed that the choice to provide transportation service is completely within the pipelines' discretion. If a pipeline so desires, it may remain as a merchant and the Commission will not compel it to provide transportation services. If it decides to offer both sales and transportation services, and it seeks "blanket" authorization to offer the transportation services, the Commission will condition the transportation authorization to prevent undue discrimination. Thus, there is no basis for the argument that the decision below compels pipelines to provide transportation service, and the decision below is not in conflict with the decision in *Midwest Video.*

2. Order No. 436 Is Consistent With The NGA's Treatment Of The Common Carriage Issue

The NGA is silent with respect to common carriage. However, the legislative history supports the conclusion that the Commission may lawfully impose conditions on a proposed service without running afoul of any alleged or implied prohibition against the imposition of common carrier status on pipelines. The petitioners place heavy reliance upon the fact that Congress did not adopt proposed NGA provisions requiring natural gas companies to transport gas for any person upon reasonable request, and authorizing the Commission to *order* them to do so. H.R. 5423, 74th Cong., 1st Sess., §§303, 304 (1935). Based solely on Congress' failure to enact these provisions, petitioners not only conclude that the Commission cannot impose common carrier status on pipelines, but that it cannot condition a voluntary request to provide transportation services so as to prevent discriminatory and anticompetitive behavior. It is unnecessary to address the former conclusion because the latter conclusion is clearly in error.

At most, the legislative history indicates that Congress' concern with the common carriage issue was only to assure

that pipelines would not be *required* to operate as common carriers. The legislative history does not, however, indicate that Congress intended to allow pipelines to act in a decidedly discriminatory fashion with respect to gas transportation services. The draft provisions simply demonstrate that Congress declined to enact provisions *specifically* granting the Commission the authority to *require* pipelines to become common carriers. The proposed Section 303(a) made it "the *duty* of every distributor to transmit natural gas for any person upon reasonable request therefore," and the proposed Section 304 gave the Commission authority to "*direct* a distributor to transmit natural gas for, or exchange gas with, one or more persons." (emphasis added). In contrast to these provisions, Order No. 436 does not impose a duty on pipelines to transport gas for anyone, nor has the Commission directed the pipelines to transport gas for others.

Thus, the legislative history demonstrates that Congress declined to specifically authorize the Commission to compel pipelines to become common carriers. However, as the court below correctly concluded, "it affords weak—almost invisible—support for the idea that the Commission could under no circumstances whatsoever impose obligations encompassing the core of a common carriage duty," particularly given the fact that "in the NGA Congress affirmatively [gave] the Commission power to stamp out undue discrimination. . . ." (J.A. 25a-26a). As discussed *supra*, this is the power the Commission exercised in promulgating the open access condition. (J.A. 26a).

Inconclusive legislative history cannot be utilized to supply a provision not enacted by Congress. *United States v. American College of Physicians*, 475 U.S. 834, 846-47 (1986). Consistent with this principle, nothing in the legislative history indicates that it was Congress' intent to limit the Commission's ability to condition certificated services to remedy behavior found to be unlawful and contrary to the express purposes of the NGA.

3. Order No. 436 Is Consistent With The NGPA's Treatment Of The Common Carriage Issue

One of the purposes of the NGPA was to eliminate the regulatory barriers between the interstate and intrastate natural gas markets. Indeed, the legislative history indicates that Sections 311 and 602(b)(2) were designed to "facilitate . . . development of a national natural gas transportation network without subjecting intrastate pipelines, already regulated by State agencies, to FPC regulation over the entirety of their operations." H.R. Rep. No. 543, 95th Cong., 1st Sess. 45 (1977). (J.A. 34a). Section 311(a), 15 U.S.C. §3371a, permits Commission authorization of transportation by an interstate pipeline on behalf of an intrastate pipeline of LDC, and by an intrastate pipeline on behalf of an interstate pipeline or LDC. Section 311(c), 15 U.S.C. §3371(c), specifically provides:

> Any authorization granted under this section shall be under such terms and conditions as the Commission may prescribe.

Order No. 436 conditions Section 311 transportation services on open access. Petitioners argue that such conditioning runs afoul of Section 602(b) of the NGPA, which provides:

> (b) Common carriers. No person shall be subject to regulation as a common carrier under any provision of Federal or State Law by reason of any transportation—
>
> (1) pursuant to any order under Section 3362(c) or Section 3363(b), (c), (d), or (i) of this title; or
>
> (2) authorized by the Commission under Section 3371(a) of this title.

15 U.S.C. §3432(b) (1982). Petitioners argue for an expansive reading of this section, contending it raises an express and absolute bar against the imposition of any obligations which are the same or similar to the obligations imposed on common carriers. This contention is incorrect for several reasons.

First, the argument hinges on the mistaken premise that a lawful exercise of the Commission's conditioning authority is tantamount to compelling pipelines to provide transportation services to all who request it. As demonstrated above, the nondiscriminatory access condition does *not* compel pipelines to provide service; thus, Section 602(b) is simply irrelevant.

However, on its face, Section 602(b) does not support the expansive proscription favored by the petitioners. First, Section 602(b) must be read together with Section 311(c) which allows the Commission to condition NGPA Section 311 transportation on such terms as the Commission specifies. The construction urged by petitioners would read Section 311(c) out of the statute, in contravention of normal rules of statutory construction. *See Colautti v. Franklin,* 439 U.S. 379, 392 (1979), *United States v. Menasche,* 348 U.S. 528, 538–39 (1955). Moreover, the petitioners' interpretation would bar the Commission from imposing conditions requiring nondiscriminatory access on Section 311 transportation even in the face of express findings of unlawful behavior. As the court below succinctly and correctly observed:

> Congress may have intended §602 to bar FERC from conditioning §311 transportation upon assurances of nondiscrimination. We doubt it. . . . The reasonableness is underscored by FERC's broad duties to assure consumers access to natural gas at prices such as would prevail in the absence of pipeline market power and its conclusion that under the present circumstances fulfillment of that duty requires such conditioning.

(J.A. 37a) (citations omitted).

Second, Section 602 appears under the heading "Effect on State Laws." Where the meaning of a section of a statute is unclear, the title or caption of the section provides evidence of the intended Congressional scheme. *Russ v. Wilkins,* 624 F.2d 914, 922 (9th Cir. 1980), *cert. denied,* 451 U.S. 908 (1981). Interpreted together with its title, the clear intention

behind Section 602(b) was to protect pipelines choosing to provide service under Section 311 from being generally classified as common carriers, most likely by the states. Congress feared that participation in the Section 311 transportation program might be discouraged because the pipeline would find itself subject to burdensome state regulations. (*See, e.g.*, Tex. Civ. Stat. Ann. §§882–884 [Vernon 1964 and Supp. 1987] which subjects a common carrier to common law duties and a requirement to carry, for anyone, any goods of the type for which it is suited).

This valid purpose, however, does not support an interpretation which allows pipelines to discriminate at will, as the court below correctly concluded.

> A duty not to discriminate, imposed by the Commission on the basis of findings that the duty is necessary to assure consumers access to competitively priced gas, is utterly different. The imposition of the duty here facilitates the accomplishment of Congress' purposes.

(J.A. 35a). Thus, the decision below is in harmony with Section 602(b), and further review is not required.

4. Neither The Commission Nor The Court Below Has Coerced The Choice To Offer Transportation Services

Finally, petitioners argue that the choice to accept the open access condition is not a truly voluntary one. Petitioners are quick to embrace the conclusion of the court below that "when a condemned man is given the choice between the noose and the firing squad, we do not ordinarily say that he has 'voluntarily' chosen to be hanged." (J.A. 82a). However, petitioners read far too much into this observation. Contrary to petitioners' assertion, Order No. 436 presents the pipelines with a viable choice. Pipelines may either continue to operate mainly as merchants (as they have for fifty years under the Natural Gas Act), or they may become both merchants and nondiscriminatory transporters.

In discussing the Hobson's choice, the court below made it clear that *either* choice may be "fatal" to the pipelines' financial viability. Thus, a conclusion that Order No. 436 is "coerced" has no basis. Whether pipelines do or do not accept Order No. 436, the *MPC* cases stripped them of the ability to abuse their monopoly power in order to retain a market for their own over-priced gas. *MPC II,* 768 F.2d at 455; *MPC III,* 768 F.2d at 455. Thus, with or without Order No. 436, pipelines which fail to become competitive may suffer economic consequences. However, a plea to retain the power to act in an unlawful and discriminatory fashion to the detriment of consumers in order to avoid such consequences is hardly a recognized basis for the grant of certiorari.

The petitioners argue that operating without Order No. 436 transportation authority (i.e., as merchants only) would place them at a competitive disadvantage as compared to fuel oil dealers and pipelines operating pursuant to Order No. 436. This claim is wholly unsubstantiated. Pipelines which elect not to provide open access transportation may meet competition by simply offering sales prices (to all of their customers) which are competitive with alternate fuels and gas purchased from independent producers, brokers and marketers.

Federal regulation of pipelines is not designed to insulate pipelines from competition, but to protect consumers from the abuse of pipeline monopoly power. Competition, by definition, forces a company to operate in a different manner than it would choose to operate were it allowed to function as an unregulated monopolist. Competition regulates a firm's behavior in a manner which promotes economic efficiency and is ultimately beneficial to consumers. *See Northern Natural Gas Co. v. FPC,* 399 F.2d 953, 959 (D.C. Cir. 1968).

The Supreme Court has clearly held that the due process clause affords a regulated company no protection from losses inflicted by market conditions.

> All that was held is that a company could not complain if the return which was allowed made it possible for the company to operate successfully.

> There was no suggestion that less might not be allowed when the amount allowed was all the Company could earn. . . . The due process clause . . . has not and cannot be applied to ensure values or to restore values that have been lost by the operation of economic forces.

Market Street Railway Co. v. Railroad Commission, 324 U.S. 548, 566-67 (1945). Thus, the court below correctly concluded:

> Similarly, nothing in the NGA protects the pipelines from the market forces to which Order No. 436 subjects their gas marketing business, even though those forces are derived in part from a restriction on discrimination in transportation.

(J.A. 33a).

The fact that a pipeline elects to operate under Order No. 436 because it determined that it will be less successful than if it does not so elect does not mean that the pipeline has no choice. *See C. Pappas Co. v. E&J Gallo Winery,* 610 F. Supp. 662, 669 (E.D. Cal. 1985), *aff'd* 801 F.2d 399 (9th Cir. 1986). Moreover, a party cannot claim economic coercion if it has reasonable alternatives available. *See Sonnleitner v. Commissioner of Internal Revenue,* 598 F.2d 464, 468 (5th Cir. 1979). The fact that one alternative is less beneficial economically than another does not mean that alternatives were not, in fact, available. *See, e.g., Johnson, Drake & Piper, Inc. v. United States,* 531 F.2d 1037 (Ct. Cl. 1976). Order No. 436 offers pipelines clear alternatives: they may continue to perform as traditional merchants or they may choose to provide both sales and nondiscriminatory transportation services. Clearly, there is no need for this Court to review these well-settled principles.

Frost v. Railroad Commission, 271 U.S. 583 (1926), does not reflect a different principle. In that case, coercion was found where the State of California decided that a private trucking carrier could use the highways *only* if it subjected itself to state regulation. The issue was not whether the state could force the company to make a choice of what service it

would provide, but whether the company could conduct *any* business unless it subjected itself to state regulation. Pursuant to Order No. 436, pipelines may continue to function primarily as merchants, and are not required to accept an open access certificate in order to conduct *any* business. While this choice may be influenced by economic considerations, that fact alone does not render the choice involuntary or coerced. Thus, the *Frost* case is inapposite.

Indeed, this argument exposes the true basis of petitioners' claims. Pipelines are opposed to open access because their own gas supplies are priced well above market prices, rendering them incapable of competing with gas which is competitively priced. The pipelines' problems in this regard stem from so-called take-or-pay contracts, i.e., contracts which require pipelines to either "take" a certain amount of gas from a producer or "pay" for it. These contracts currently call for gas prices far in excess of current market levels. (J.A. 75a). As the court below correctly observed, this price discrepancy represents "a sunk loss of billions of dollars" and raises the question of who must bear this loss. (J.A. 76a).

The purchasing practices of pipelines which resulted in take-or-pay liabilities are highly controversial. The pipelines were *not* innocent bystanders victimized by increases in gas prices caused by third parties. Rather, they were both the responsible contracting parties *and* the direct beneficiaries of these soaring prices. *See, e.g., Office of Consumers' Counsel, State of Ohio v. FERC,* 783 F.2d 206 (D.C. Cir. 1986). The pipelines' argument is not, therefore, that they are being coerced to transport gas. Rather, their complaint is that the Commission will not allow them to provide transportation services on their own discriminatory terms so as to minimize the impact of their decisions with respect to take-or-pay contracts.

The court below was, nevertheless, sympathetic to the pipelines' take-or-pay concerns. The court vacated Order No. 436, remanding it to the Commission with instructions to "more convincingly" address the magnitude of the take-or-

pay problem and the adverse consequences likely to result from the imposition of open access conditions. The Commission, in response to the court's concerns, addressed this issue in its interim Order No. 500, where it implemented a "producer crediting mechanism" specifically designed to prevent open access transportation from exacerbating the pipelines' take-or-pay liabilities. 52 Fed. Reg. at 30,337-47. The adequacy and lawfulness of this mechanism may be challenged in future proceedings, and is not ripe for review at this time. Indeed, petitioners Texas Eastern Transmission Corporation and the Interstate Natural Gas Association of America have requested judicial review of Order No. 500.[9]

C. There Is No Conflict Between The Decision Of The Court Below And Decisions Of This Court And Other Circuits

Issuance of the writ is also urged on the basis of an alleged conflict between certain decisions of the Supreme Court, various Circuit Courts, and the decision below. The decision below is alleged to be in conflict with the following decisions: *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973) ("Otter Tail"); *Florida Power & Light Co. v. FERC,* 660 F.2d 668 (5th Cir. 1981), *cert. denied,* 459 U.S. 1156 (1983) ("FP&L"); *Richmond Power & Light v. FERC,* 574 F.2d 610 (D.C. Cir. 1978), *cert. denied,* 439 U.S. 893 (1979) ("Richmond"); *New York State Electric & Gas Co. v. New York,* 638 F.2d 388 (3rd Cir. 1980), *cert. denied,* 454 U.S. 821 (1981) ("NYSE&G"); and, *Central West Utility Co. v. FPC,* 247 F.2d 306 (3rd Cir. 1957) ("Central West"). Each of these cases is distinguishable from the decision below.

With respect to *Otter Tail,* it is true, as petitioners claim, that this Court observed that the Federal Power Commission ("FPC") was given no specific authority to order wheeling

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[9] *Texas Eastern Transmission Corporation v. FERC,* No. 87-1773, and *Interstate Natural Gas Association of America v. FERC,* No. 87-1595, pending in the United States Court of Appeals for the District of Columbia Circuit.

under the Federal Power Act[10] even though the legislation originally introduced contained common carrier provisions. The Court therefore held that there was no jurisdictional conflict between the District Court, which had ordered wheeling as a remedy for antitrust violations, and the FPC.

The decision below is not in conflict with *Otter Tail.* First, as discussed *supra,* neither the decision below nor Order No. 436 imposes common carrier status on pipelines. Second, *Otter Tail* did not address the issue presented here, i.e., whether the Commission may lawfully condition certificated services so as to prevent unduly discriminatory and anticompetitive behavior. Third, while the Federal Power Act and the Natural Gas Act are, in most respects, in *pari materia,* there is no provision in the FPA similar to Section 7(c) of the NGA. Finally, *Otter Tail* dealt specifically with the District Court's power to impose remedies for antitrust violations, not with the Commission's ability to lawfully condition a grant of authority so as to prevent unduly discriminatory and anticompetitive behavior.[11] Thus, *Otter Tail* is simply inapposite.

The *FP&L* case is easily distinguishable from the decision below. Under the facts in that case, the court held that the Commission's order did, in effect, impose common carrier status on the utility. But there is a critical distinction. The court in *FP&L* specifically found that the Commission did not order wheeling as a remedy for anticompetitive conduct. The court observed that the question of the Commission's authority in that respect was an open one, concluding:

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[10] The Federal Power Act ("FPA"), 16 U.S.C. §§791a-824k (1935).

[11] As an interesting aside, Otter Tail Power Company argued that it would face severe financial problems if compelled to serve. The Supreme Court recognized the argument as a familiar one in antitrust cases, and cited its opinion in *United States v. Arnold, Schwinn and Co.,* 388 U.S. 365, 375 (1967): "The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct." *Compare* the argument in Section B.3 *supra.*

> In the instant case, however, we need not resolve the question as to what power the Commission may have to remedy antitrust violations, since we conclude that the Commission did not rely on this rationale.

FP&L, 660 F.2d at 678. In stark contrast, the decision below upheld specific Commission findings, based on a massive record, that pipelines possess substantial market power, that they have exercised this power to deny captive customers access to competitively priced gas, and that this practice has denied consumers access to gas at the lowest reasonable rates. (J.A. 30a). Thus, the Commission here did precisely what it did not do in *FP&L:* it framed its order as a remedy for anticompetitive behavior.

Similarly, in *Richmond,* there was no finding that wheeling on a selective basis would defeat regulatory controls and the competitive incentives necessary to protect all consumers. Moreover, it was specifically found that the party alleging discrimination "spurned the opportunity to demonstrate that particular activities were unreasonably anticompetitive or discriminatory." Thus, the Commission, consistent with Congressional intent, correctly ruled that a "decision to wheel for one customer but not for another is not *automatically* discriminatory." *Richmond,* 574 F.2d at 623 (emphasis added). In sharp contrast to *Richmond* and the other wheeling cases, the decision below and Order No. 436 contain specific findings concerning the anticompetitive and unduly discriminatory behavior of pipelines and specifically invoke the exercise of the Commission's NGA Section 7 authority to remedy that behavior.[12]

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[12] Section 7 of the NGA has been described by the Supreme Court as the "heart" of the NGA, *Atlantic Refining Co.,* 360 U.S. at 388.

The *NYSE&G* case is also readily distinguishable from the decision below. The case dealt with the Commission's "new" authority to order wheeling under the Public Utility Regulatory Policies Act.[13] The court found that the Commission had not made the findings required by PURPA and remanded the order to the Commission for consideration of the same. *NYSE&G*, 638 F.2d at 401-02. The decision did not address the Commission's authority to compel wheeling in the face of specific findings of unduly discriminatory and anti-competitive behavior.

Finally, the *Central West* case does not advance the petitioners' argument. There, the court held that an electric utility could not be compelled to *enlarge* its facilities so as to serve additional customers. *Central West*, 247 F.2d at 312-19. Nothing in the decision below compels pipelines to build additional facilities or expand existing ones. Thus, *Central West* is simply inapposite.

In conclusion, the allegedly conflicting decisions relied upon by the petitioners are readily distinguishable upon both the facts and the law. Accordingly, they present no basis for the grant of certiorari.

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[13] The Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. §§824a-824k (1982).

CONCLUSION

The Petitions For Writ Of Certiorari should be denied.

Respectfully submitted,

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